NG KAH HENG

v.

NG PEK CHOO

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 25-1041 OF 1986]
3 NOVEMBER 1988

TORT: *Negligence - Plaintiff motorcyclist suddenly came upon three potholes in his path - While trying to avoid potholes plaintiff ran into one of the potholes resulting in his fall onto wrong side of road - While getting up defendant's motorcar knocked him down from behind.*

TORT*: Negligence - Road accident - Defence of - Straight stretch of road and defendant familiar with road and aware of potholes - Whether defendant drove with due care and attention and guilty of negligence.*

TORT*: Negligence - Contributory Negligence - Plaintiff travelling at a great speed which rendered it impossible to pull up to complete stop abruptly - Whether plaintiff very substantially contributed to accident - Liability apportioned at 30% against defendant.*

DAMAGES: *Plaintiff is paraplegic as a result of accident - Sustained fracture - Dislocation of the 12th thoracic vertebra with damage to spinal cord - Lost all protective sensation below level of umbilicus - Prone to pressure ulcers both in his feet and over his sacrum - No voluntary control over movements of bowels.*

DAMAGES: *Someone move bowels manually - Has to be physically aided by someone to move out of wheel-chair - Requires assistance of an able-bodied person in his daily life - Award of RM250 for cost of nursing and cost of future nursing care according to annuity table.*

The plaintiff was injured in an accident on 1 September 1984 at about 9.30 p.m. along Jalan Storey, Johor Bahru involving the plaintiff who was picking himself up just after a fall from his motorcycle after he ran into a pothole and the defendant's motorcar knocked into the plaintiff from the rear while travelling in the opposite direction.

Held:

[1] As the road at the scene of the accident according to the defendant's own evidence was a fairly straight road she should have been able to see the approaching traffic and particularly the motorcycle at some distance in front of her before the event if she had kept a proper look out.

[2] As the defendant allowed herself to be taken by great surprise when the plaintiff appeared so suddenly in her path indicates a lack of due care on her part in using a public road already known to her to be inherently dangerous to users of the road, the Court found the defendant was not driving with due care and attention and was guilty of negligence.

[3] However, there is no question that the plaintiff contributed very substantially to the accident either because he must have been travelling at a great speed which rendered it impossible for him to pull up to a complete stop abruptly or because he himself had not driven with due care and attention for otherwise his headlights would have shown the potholes ahead of him.

[4] The plaintiff must therefore bear his share of the responsibility for the injuries he sustained and in the circumstances the Court apportioned liability against the defendant at 30%.

Damages

[5] The Court awarded to the plaintiff on the basis of 100% liability as follows:

(i) RM120,000 for pain and suffering and loss of expectation of life.

(ii) RM9,500 for cost of nursing care for 38 months from 1 September 1984 to date, 3 November 1988 at RM250 per month.

(iii) RM33,822 cost of future nursing care on the basis of 17 years' purchase at RM250 according to the annuity table.

(iv) RM38,000 as loss of earnings for 38 months from 1 September 1984 to date 3 November 1988 at RM1,000 per month.

(v) RM81,173 as loss of future earnings, on the basis of 17 year's purchase RM600 according to the annuity table.

(vi) Agreed special damages RM2,027.

(vii) Awards reduced by 70% and the award under item (i) will bear 8% interest per annum from the date of the service of the writ and at 4% per annum for awards under items (ii), (iv) and (vi) from the date of the accident.

[Plaintiff awarded damages based on 30% liability against the defendant and 70% contributory negligence against the plaintiff.]

Cases referred to:
Lim Kim Chai & Anor. v. Foo See Fatt [1970] 2 MLJ 207
Abdul Munir b. Haji Abdul Rahman v. Mohamed Adzha bin Hassan [1985] 2 MLJ cl
Tarmi bte. Sanusi & Anor. v. Yusoff Bashah & Ors. [1986] 2 MLJ cclvii
Lee Ann v. Mohamed Sahari bin Zakaria [1986] CLJ (Rep) 432
Tominam bte. Tukimin v. Toh Kai Chup [1985] 2 MLJ 345
Tan Teck Chye v. Chia Mee Sieng [1988] 2 MLJ xxvi

Other sources referred to:
Clerk & Lindsell on Torts, 14th Edn., at para. 985

For the plaintiff - N. Jegatheesan; M/s. John Ang & Jega
For the defendant - S. Sagadeva; M/s. Yee & Saga

JUDGMENT

LC Vohrah J:

The accident occurred at about 9.30 p.m. on 1 September 1984 along Jalan Storey which, according to the sketch plan AB12, is a road 6 metres wide serving two-way traffic coming from Jalan Tebrau in the north and from Jalan Lumba Kuda in the south and inclining very slightly upwards in the direction of Jalan Lumba Kuda.

The version of the accident as given by the plaintiff was in short that whilst he was travelling along Jalan Storey on his correct side of the road in the direction of Jalan Lumba Kuda at a speed of approximately 40 kilometres an hour he suddenly came upon three potholes in his path and although he tried to avoid them he ran into one of them resulting in his falling on to his wrong side of the road 1 foot to 2 feet away from the centre white line. He picked himself and found himself facing the direction from which he had come when he was suddenly

knocked down from behind by a car rendering him unconscious. All this happened within a matter of a few seconds. At the time of the accident he had seldom used this particular road.

The defendant's version is that as she was proceeding on her correct side of this road at a speed of about 30 mph a motor-cycle from the opposite direction appeared so suddenly in her path about 8 feet in front of her to her right that a collision occurred. All this happened in a matter of about 3 seconds and she was not able to take any evasive action except to brake suddenly. At the time of impact the plaintiff had already fallen off his motorcycle. She was familiar with this road.

Of these two witnesses, the plaintiff was very certain about how the accident occurred. His police report AB11 supports his testimony that he had fallen from his motor-cycle on to his offside after running over a pothole and that he was knocked into whilst he was in the process of picking himself up. Although the police report was made one and half months after the accident, so that the plaintiff would have had ample time to think about what he should say in the event of his making a claim, there is no reason for me to doubt the veracity of the report. The defendant, on the other hand, appeared to be certain only about one aspect of the accident, that is the suddenness with which the plaintiff's motor-cycle came into her path. In one part of her testimony she said it was her car which "collided"into the motor-cycle "by brushing into it." Then in another part she said it was the motor-cycle with its rider which collided into her car. In her police report, which she admitted was read back to her, it was said that it was only after motorcycle had encroached into her path and was approaching her car that it fell on the offside of her car whereupon she applied her brakes as a result of which her car skidded and knocked into the plaintiff. Significantly in cross-examination she said.

> What I remember now is that I saw the motor-cycle come into my path. That is practically what I remember.

Further although it is stated in her report that the motor-cycle was attempting to overtake a motor-car, in her evidence she said she presumed it was doing so because it had come alongside the car and that too only in re-examination. At best her evidence of how the collision occurred was rather hazy probably because of the passage of four years.

Accordingly, of the two versions that have been given, I would on a balance of probabilities, accept that given by the plaintiff for its consistency which was not in any way shaken in cross examination and the story that emerges is that the plaintiff was knocked down on his wrong side of the road by the defendants car travelling on her correct side of the road whilst he was in the process of picking himself up from his fall after his motor-cycle had run over a pothole which he had failed to avoid in time.

Reference has been made by Counsel for the defendant to the case of *Lim Kim Chai & Anor. v. Foo See Fatt* [1970] 2 MLJ 207 where Sharma, J decided that the onus of proving inevitable accident, a defence which has been raised in this instant case and which is in effect a denial of any negligence on the part of the defendant, is on the defendant. *Clerk & Lindsell on Torts*, Fourteenth Edn., at para. 985 states:

> Inevitable accident amounts essentially to a denial that due care was not exercised. The defence is in effect but another way of saying that the defendant has not been negligent, and as such, shows only that an essential ingredient of liability, namely carelessness, has not been established. The success of the plea depends upon the facts of individual cases ...

The defendant, in my view, has failed to show that she was not negligent. She admitted that at the time of the accident she was familiar with the scene of the accident and was aware of potholes, one that was large and the other two that were small. She also admitted that consequently if she had travelled on the side of the road where the potholes lay she herself would have been careful indicating that they presented a danger to the users of that side of the road. As the road at the scene according to her own evidence was a fairly straight road, she should have been able to see the approaching traffic and particularly the motor-cycle at some distance in front of her before the event. That she did not and allowed herself to be taken by great surprise when the plaintiff appeared so suddenly in her path indicates a lack of due care on her part in using a public road already known to her to be inherent dangerous to users generally of the road. I therefore find that the defendant was not driving with due care and attention and was therefore guilty of negligence. There is however in my opinion no question that the plaintiff contributed very substantially to the accident either because he must have been travelling at a great speed which rendered it impossible for him to pull up to a complete stop abruptly or because he himself had not driven with due care and attention for otherwise his headlight would have shown the potholes ahead of him. The plaintiff must therefore bear his share of the responsibility for the injuries he sustained. I would apportion liability in the circumstances against the defendant at 30%.

Now to the question of damages, according to the medical report AB2-4, the plaintiff who was a plasterer in the building trade is now a paraplegic as a result of the accident. He sustained a fracture-dislocation of the 12th thoracic vertebra with damage to the spinal cord and has lost all protective sensation below the level of the umbilicus and is accordingly prone to pressure ulcers both in his feet and over his sacrum. He has no voluntary control over the passing of urine and consequently has a plastic bag strapped to his penis to catch the urine that flows out causing maceration of the skin leading to ulceration at the base of the penis making him prone to recurrent infection of the bladder which can ascend to the kidney and damage it thereby endangering his life and reducing his life expectancy. He also has no control over the movements of his bowels and someone has to move them manually. He is not capable of walking about on his own and has to be physically aided by someone to be moved out of his wheel-chair. He would not be able to take up any occupation that requires his staying in one position for more than very short periods and is considered medically as almost unemployable. He requires the assistance of an able-bodied person in his daily life. In my view 17 years purchase, as suggested by Counsel for the plaintiff is fair and reasonable for someone who is now aged 27. I accept the evidence of the plaintiff's former employer in Singapore, PW3 to the effect that the plaintiff was a good worker whom he would have continued to employ if he had been fit to work. I think the figures of RM1,000 as his monthly salary suggested by Counsel for the plaintiff for his past loss and of RM600 as the multiplicand in respect of future loss having regard to fluctuations in market conditions are fair and reasonable. The figure of RM250 per month as the cost of nursing care is, in my view, also fair and reasonable.

Both Counsel have referred me to several authorities, namely, *Abdul Munir b. Haji Abdul Rahman v. Mohamed Adzha bin Hassan* [1985] 2 MLJ cl., *Tarmi bte Sanusi & Anor. v. Yusoff Bashah & Ors.* [1986] 2 MLJ cclvii, *Lee Ann v. Mohamed Sahari bin Zakaria*, [1986] CLJ (Rep) 432, *Mohamed Fami Hassan v. Swissco Pte. Ltd. & Government of the Republic of Iraqi (Iraqi State Enterprise for Maritime Transport)* [1986] 1 MLJ 461 at p. 464, *Tominam bte. Tukimin v. Toh Kai Chup* [1985] 2 MLJ 345 and *Tan Teck Chye v. Chia Mee Sieng* [1988] 2 MLJ xxvi, where awards have been made in respect of injuries similar to those of the plaintiff, and after considering all these authorities, I make the following awards on the basis of 100% liability:

1)	For pain and suffering and loss of amenities including loss or expectation of life ...	RM120,000
2)	Cost of nursing care for 38 months from 1 September 1984 to date at RM250 per month ...	RM 9,500
3)	Cost of future nursing care on the basis of 17 years' purchase at RM250 according to the annuity table ...	RM 33,822
4)	Loss of Earnings for 38 months from 1 September 1984 to date at RM1,000 per month ...	RM 38,000
5)	Loss of Future Earnings on the basis of 17 years' purchase at RM600 according to the annuity table ...	RM 81,173
6)	Agreed Special Damages ...	RM 2,027

All these awards will be reduced by 70%. The award under item (1) will bear 8% interest per annum from the date of the service of the writ and those under items (2) and (4) and (6) 4% interest per annum from the date of the accident.

Costs to be agreed upon or taxed.

Also found at [1989] 1 CLJ 962